SUPREME COURT, U. S.
No. 1289
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In the Supreme Court of the United States

OCTOBER TERM, 1967

GARLAND CLAUDE COCHRAN AND
JACK DONALD EVANS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,

FRED M. VINSON, JR.,
Assistant Attorney General,

BEATRICE ROSENBERG,
MERVYN HAMBURG,
Attorneys,

Department of Justice,
Washington, D.C. 20530.

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OPINION BELOW

The opinion of the court of appeals (Pet. A1-A3) is reported at 389 F. 2d 326.

JURISDICTION

The judgment of the court of appeals was entered on January 30, 1968. A petition for rehearing was denied on March 6, 1968. The petition for a writ of certiorari was filed on April 3, 1968. The jurisdic-

tion of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

26 U.S.C. 5205(a)(2), in pertinent part, provides:

> No person shall transport, possess, buy, sell, or transfer any distilled spirits, unless the immediate container thereof is stamped by a stamp evidencing the determination of the tax or indicating compliance with the provisions of this chapter.

26 U.S.C. 5604(a)(1), in pertinent part, provides:

> Any person who shall (1) transport, possess, buy, sell, or transfer any distilled spirits, required to be stamped under the provisions of section 5205(a)(2), unless the immediate container thereof has affixed thereto a stamp as required by such section * * * shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, for each such offense.

QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that petitioners had no standing to challenge the search of an acquitted co-defendant, and that, in any event, that search was lawful.

2. Whether the statutory provisions proscribing the possession and sale of untaxed liquor are unenforceable by criminal prosecution.

STATEMENT

After a jury trial in the United States District Court for the District of Colorado, petitioners were

convicted of possessing and selling untaxed liquor, in violation of 26 U.S.C. 5604(a). On May 12, 1967, Cochran was sentenced to imprisonment for four years, and Evans to imprisonment for two years. The court of appeals affirmed *per curiam* (Pet. A1-A3).

The evidence showed that on August 21, 1966, petitioner Cochran, a resident of Georgia, telephoned John Peck, who lived in Denver, Colorado. After identifying himself as a friend of Peck's uncle, Cochran inquired into the prospects for selling moonshine whiskey in the Denver area (Tr. 6-7).[1] He asked Peck to obtain information on the market price, and to contact someone who would be willing to finance a local distributorship. Peck agreed to do so. Cochran then stated that he would come to Denver and bring a sample of his product, which Peck could use to obtain contacts (Tr. 7). Peck informed government agents of this conversation, and agreed to assist them (Tr. 7-8).

On August 26, Peck met Cochran at the Denver airport. They drove in Peck's truck to his radio electronics store, situated near the intersection of 8th Avenue and Colorado Boulevard. On the way, they discussed the potential volume which could be marketed. Cochran stated that he was the largest supplier of moonshine, and could fill a request for 5,000 gallons (Tr. 12). However, Cochran preferred to limit the first shipment to 1,500 gallons, which would not require use of a large trailer truck. The price

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[1] The transcript of trial ("Tr.") has been filed with the Clerk of this Court.

was set at $6 or $6.75 per gallon (Tr. 13). Cochran left his sample bottle (Govt. Exh. 1) with Peck at his store. He stayed only briefly, and then left for Atlanta by plane (Tr. 13, 70). The following day Peck turned the bottle over to government agent Cowles (Tr. 14).

After a number of delays, Cochran called Peck on September 6. He said that he was finally ready to depart with his shipment, and would next make contact when his truck crossed into Colorado (Tr. 17). No further communications occurred until September 9, when Cochran informed Peck by telephone that he had crossed into Colorado, but had brought only 575 gallons (Tr. 19). Peck relayed this information to agent Cowles. That evening, Cowles, Peck, and Denver plainclothes officer Walton conversed at the drug store on the corner of 8th Avenue and Colorado Boulevard (Tr. 21). Peck saw Cochran enter and proceed to a telephone booth. Cochran called Peck's store, and spoke with Mrs. Peck. She went to the drug store and summoned Peck (Tr. 21-22, 73-74). During their telephone conversation, Peck informed Cochran that his "contact" (agent Cowles) and a driver (officer Walton) were prepared to take delivery after dark. Cochran told Peck that the merchandise was in a U-Haul-It truck parked in the lot behind Peck's store (Tr. 21-22). Cochran gave permission for Peck's principal to take the truck to a place where he could inspect the merchandise before making payment.

At 9:00 p.m. Cowles and Walton drove the truck to a garage, where they were joined by other Alcohol

and Tax Division agents (Tr. 90, 156, 174). In the rear of the truck the agents found 143 cases containing four one-gallon jugs each and one case with three one-gallon jugs (Tr. 91). Several jugs were opened, and were found to contain moonshine whiskey. None of the bottles bore federal stamps or any other evidence that the federal tax had been paid (Tr. 91, 155).

The truck was returned to the parking lot at 9:30. Cowles gave Peck $3,750 in bills whose serial numbers had previously been recorded. Peck proceeded to the drug store to pay Cochran. Cowles entered that store from the rear, and observed Cochran counting the money. He placed Cochran under arrest and retrieved the currency (Tr. 94). A search of Cochran uncovered a copy of a truck rental contract, with "Howard J. Reese" named as lessee (Tr. 96).

During the evening other agents had maintained a surveillance around Peck's store. They observed two men, later identified as petitioner Evans and co-defendant Rider,[2] roaming about the store area. They also saw a Pontiac automobile bearing Georgia plates parked in a service station across from the drug store (Tr. 155, 165). After Cochran's arrest, the agents observed Evans and Rider about to drive away in the Pontiac. The agents stopped the men at the service station and questioned them. Within three minutes agent West, from the Atlanta office, joined his associates at the gas station. West was familiar with the fact that Rider, Evans, and Cochran had

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[2] The jury acquitted Rider (Tr. 194).

been involved in prior violations of the liquor laws, and worked together (Tr. 185-186). As West stood by, another agent searched the two. He found on the person of petitioner Evans a Colorado truck port of entry receipt signed by "Howard J. Reese" and a Georgia driver's license bearing that name (Tr. 168). At trial, the service station owner who had prepared the truck rental contract identified Evans as Reese (Tr. 121-122). A Texas highway patrolman testified that on September 9, he had accompanied Cochran and Rider to Dumas, Texas, and that Cochran asked for directions to Denver. They were driving a Pontiac, the license plate of which matched the one on the Pontiac found on the service station lot in Denver (Tr. 130-131).

ARGUMENT.

1. During the search of Rider and petitioner Evans incident to their apprehension at the service station, agent Hoover found on Rider's person a sheet of paper upon which was written one of the telephone numbers of Peck's store (Govt. Exh. 18). Although no pretrial motion to suppress was filed, defense counsel, who represented all three defendants at the joint trial, entered an objection when the prosecution sought to admit the paper in evidence (Tr. 173). After hearing testimony from agent West, the trial judge found that Rider's arrest and the search incident thereto had been lawfully executed (Tr. 192), and admitted the document in evidence. The court of appeals agreed that there was probable cause for Rider's arrest (Pet. A2). Moreover, the court

concluded, petitioners Cochran and Evans had no standing to question the search of Rider.

The ruling of the court of appeals was correct. The rights of privacy of petitioners were not invaded by the search under attack. *Wong Sun* v. *United States*, 371 U.S. 471; *Diaz-Rosendo* v. *United States*, 357 F.2d 124 (C.A. 9), certiorari denied, 385 U.S. 856.[3] In any event, as the lower courts held, there was probable cause for the search of Rider. The agents knew that the unlawful shipment of untaxed liquor was being shipped from Georgia, and that Peck's contact (Cochran) was not alone. They had observed Evans and Rider roaming about in the immediate vicinity of Peck's store for an hour before

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[3] Petitioners interpret *McDonald* v. *United States*, 335 U.S. 451, 456, as granting them standing to object to a search of a co-defendant. However, the appeal of the denial of the motion to suppress in *McDonald* was made by the victim of the search, who clearly had standing. Only after concluding that the search was illegal, and that the evidence erroneously admitted substantially prejudiced the co-defendant did the opinion of Mr. Justice Douglas conclude that reversal of the co-defendant's as well as the victim's conviction was appropriate. In light of these circumstances, and of this Court's subsequent decisions in *Jones* v. *United States*, 362 U.S. 257, and *Wong Sun* v. *United States*, 371 U.S. 471, any reliance on *McDonald* as standing for a broader proposition is misplaced. Similarly, petitioners err in asserting that the decision below is in conflict with decisions of the First and Fifth Circuits. Both courts in *Rosencranz* v. *United States*, 334 F.2d 738 (C.A. 1), and *Barnett* v. *United States*, 384 F.2d 848 (C.A. 5), went no further than to apply *McDonald* in circumstances they found to be proper. No occasion is presented to consider the applicability of those decisions unless—contrary to the correct ruling of the courts below here—it is first determined that the search of the victim was unlawful.

the apprehension was made. After Cochran's arrest, the agents saw the two men proceed across the street to the service station and attempt to depart in a car bearing Georgia plates. Under these circumstances, the agents had probable cause to arrest the men. Nothing in *United States* v. *DiRe*, 332 U.S. 581, relied on by petitioners, requires a different result.

Moreover, the only evidence seized as a result of the search of Rider was a piece of paper, and the only writing on the document relevant to this case was a notation of the telephone number of Peck's store (Govt. Exh. 18). In view of the overwhelming evidence of guilt, which included numerous exhibits and the testimony of Peck, his wife, several federal agents, the lessor of the truck, and others who connected both petitioners to the illegal operations, even if the trial judge had erroneously admitted the exhibit in evidence, its effect was patently insignificant.

2. This Court's decisions in *Marchetti* v. *United States*, 390 U.S. 39, *Grosso* v. *United States*, 390 U.S. 62, and *Haynes* v. *United States*, 390 U.S. 85, provide no occasion for a remand in the instant case. The present statutes, unlike those involved in *Marchetti*, *Grosso*, and *Haynes*, did not require petitioners, through a registration provision, to disclose any information, much less information which would have tended to incriminate them. Their prosecution did not rest upon their failure to register a distillery or file a tax return. Indeed, the evidence does not indicate that petitioners were required to do these acts, since there was no showing that they produced the distilled spirits which were unlawfully transport-

ed. Petitioners' sole duty under the applicable statutes was to refrain from transporting and selling the bottles of liquor unless each bore the required tax stamp. The omission of this duty—the performance of which would not have entailed compulsory disclosure—was the crime for which they were indicted and convicted. In such circumstances petitioners were not "confronted by substantial hazards of self-incrimination" (*Marchetti* v. *United States*, 390 U.S. at 61).[4]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
MERVYN HAMBURG,
Attorneys.

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[4] Moreover, unlike the situation in *Marchetti*, *Grosso*, and *Haynes*, the statutes requiring registration of distilleries and the corresponding criminal provisions are not directed at persons "inherently suspect of criminal activities," but seek to regulate a legitimate industry, from which billions of tax dollars are derived. See *United States* v. *McGee*, 3 Crim. L. Rep. 2002 (D. Tenn.), decided March 15, 1968. And here, unlike in *Marchetti* and *Grosso*, there was no showing of any possible incrimination under State law.

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